Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109

COMMENTS OF CONSOLIDATED COMMUNICATIONS HOLDINGS, INC ON ARBITRAGE ISSUES RAISED IN SECTION XV OF THE NPRM

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I. Introduction and summary

Consolidated Communications Holdings, Inc. ("CCI") on behalf of its operating subsidiaries, submits these comments on the Federal Communication Commission's ("FCC or Commission") Notice of Proposed Rulemaking ("NPRM"),[1] Section XV. CCI is an established rural incumbent local exchange company providing communication services to residential and business customers in Illinois, Texas and Pennsylvania. Each of CCI's operating companies has been operating in its local market for over 100 years. With 237,141 ILEC access lines, 81,090

[1] *In the Matter of Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing a Unified Intercarrier Compensation System, et al.*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Dockets No. 01-92, 96-45, FCC 11-13, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (rel. Feb. 8, 2011) ("NPRM").

Competitive Local Exchange Carrier (CLEC) access line equivalents, 106,387 DSL subscribers, and 29,236 IPTV subscribers at December 31, 2010, the Company offers a wide range of telecommunications services, including local and long distance service, custom calling features, private line services, high-speed Internet access, digital TV, carrier access services, and directory publishing. Several of these operating companies have, since the enactment of the Telecommunications Act of 1996, operated pursuant to the rural exemption set forth in Section 251(f)(1) and in some cases that rural exemption has been modified so that CCI's operating ILEC provides interconnection pursuant to § 251(c)(2) of the Act.

CCI commends the Commission for its comprehensive NPRM and its commitment to completing action in this docket quickly. CCI supports the Commission's proposals to close loopholes that allow for arbitrage, promote competition, and move closer to the ultimate goal of unifying a carrier's intercarrier compensation rate regardless of the type of traffic it terminates. CCI remains committed to working cooperatively with the Commission and other providers to overhaul the current intercarrier compensation system that is broken and beyond repair. Adopting rules to transition from the current byzantine intercarrier compensation framework to a unified system based on cost will promote investments in advanced communications networks to the benefit of all Americans.

In addressing the arbitrage issues included in Section XV of the NPRM, CCI encourages the Commission to remain focused on the ultimate goal of a unified rate that applies to all forms of traffic, regardless of jurisdiction or type of carrier/provider. While CCI understands and supports the Commission's goal of transitioning all intercarrier compensation to a unitary rate there is no reason to single out co-called "arbitrage traffic" for a faster transition to that cost-based rate than other traffic that traverse CCI's network. In these comments, CCI recommends changes to the rules proposed to reduce arbitrage without creating competitive disadvantages or moving the industry further away from a unified rate but also sensitive to the Commission's broader goals laid out in the National Broadband Plan that recognized that intercarrier compensation revenues are an intertwined with broadband deployment. All of CCI's recommendations set forth in these comments are therefore aimed at bringing arbitrage traffic within the overarching framework for intercarrier compensation and moving all traffic to a unified intercarrier compensation rate on similar terms.

Thus, with respect to VoIP traffic, CCI recommends that the Commission immediately require that all VoIP traffic that uses North American Numbering Plan telephone numbers be subject to the same compensation to which TDM traffic is subject. In establishing that methodology, the Commission should provide that as long there remain distinctions in the applicable compensation based on whether traffic is local, intrastate or interstate, that carriers can use the NPA-NXX of the originating and terminating callers to approximate the location of such callers. In other words, treatment of calls where the originating and terminating numbers make the call appear as a local call will be subject to reciprocal compensation; calls where the numbers make the call appear to be an intrastate interexchange call shall be treated as intrastate and subject to intrastate access charges; and calls that appear as interstate or international long distance calls will be subject to interstate access charges. The rates for such compensation have already been set under existing law and can be modified consistent with any plan the Commission implements to unify intercarrier compensation at a single rate under a plan for comprehensive reform.

To address the arbitrage resulting from the phantom traffic problem described in ¶¶ 620-634 of the NPRM, CCI recommends that the Commission adopt its proposed rule requiring all providers, even those providing VoIP service, to make sure that they include the CPN of the originating caller in the signaling stream and pass that information to subsequent providers in the call flow without change. CCI contends that the Commission has the legal authority to apply this rule to intrastate and interstate traffic and has ancillary jurisdiction to apply such an obligation to VoIP providers. In addition, CCI urges the Commission to adopt other measures that would require all providers in a call flow to include the appropriate carrier code to allow the terminating carrier to bill the proper party for any applicable intercarrier compensation.

II. Immediately Imposing an Intercarrier Compensation Obligation on All VoIP Traffic is the Best Policy for Accelerating the Transition to Broadband and IP Networks

In the National Broadband Plan ("Broadband Plan"), the Commission recognized the need to modernize the system of intercarrier compensation to align this system with the Commission's goals of facilitating the deployment of broadband and the transition to more efficient IP networks.[2] The Commission also acknowledged that current regulatory uncertainty regarding the proper compensation for VoIP traffic hindered investment in broadband and IP networks and in some cases even created incentives for carriers to delay investment in such networks in order to maximize their ability to collect intercarrier compensation payments.[3] And with respect to these payments, the Commission found that this compensation is "an important part of the picture for some providers, and thus integral to the promotion of broadband deployment."[4]

Following through on the proposals laid out in the Broadband Plan, the NPRM lays out several alternatives for addressing compensation for VoIP traffic, and seeks comment on each:

[2] Broadband Plan p. 142.

[3] *Id*.

[4] *Id*.

immediate adoption of bill and keep;[5] an immediate imposition of an obligation to pay a VoIP specific rate;[6] imposition of a compensation obligation on VoIP traffic at some point in the future;[7] and imposition of an immediate obligation to pay existing compensation rates.[8]

As explained below in these comments, CCI endorses the immediate application of existing rates to VoIP traffic pursuant to the Commission's authority under §251(b)(5). This is by far the most sustainable policy result the Commission could reach and the most legally defensible for the following reasons: it is consistent with the Commission's policy of technology neutral rules; it is consistent with the Commission's statutory framework; it avoids the imposition of new burdens on carriers and VoIP providers that would be necessary in any system that requires distinguishing VoIP traffic from non-VoIP traffic; by proceeding under § 251(b)(5) it does not require the Commission to address the proper classification of VoIP traffic at this time; and it is consistent with the goals set forth in the Broadband Plan as it will reduce arbitrage and intercarrier disputes, fosters investment in broadband in rural markets and removes any disincentives for investment in broadband and IP networks.

A. The Commission's Intercarrier Compensation Policy Must be Technology and Competitively Neutral to Eliminate Incentives for Delaying Transition to All-IP Broadband Networks

The Commission has long maintained that its implementation of the Communications Act, in particular the market opening measures added with the Telecommunications Act of 1996, should be "technology neutral." In other words, the Commission's policies should not favor the adoption of one technology or another but rather permit consumers to decide what services they

[5] NPRM ¶ 615.

[6] *Id*. ¶ 616.

[7] *Id*. ¶ 617.

[8] *Id*. ¶ 618.

need. So while the Commission is correct to provide incentives for carriers to transition to all IP networks it must not do so in a way that favors IP network providers over legacy PSTN providers.

The concept of technology neutral rules as been a "hallmark" of the government's implementation of the 1996 Act.[9] The "substitution of the government's judgment for the consumer's choice through competition, "can easily distort the marketplace," and discourage "the research and innovation necessary to bring new and better products or services to market."[10] The Commission has expressed similar concerns regarding its implementation of the 1996 Act.[11]

Exempting VoIP traffic from any intercarrier compensation obligation would plainly violate the concept of technology neutrality. And, as the Broadband Plan recognized,[12] such an exemption threatens the economic stability of the intercarrier compensation system by discouraging a transition to IP networks and IP interconnection for voice traffic. As the Broadband Plan recognized, rural carriers such as CCI use the revenues from intercarrier compensation to invest in their networks, including investment for expanded broadband deployment.[13] Intercarrier compensation provides rural carriers with revenue flow to support broadband deployment in unserved areas. These investments, aimed at modernizing networks originally built for voice to become IP broadband networks where voice is merely one application that rides on the data stream, are an expensive proposition. While eliminating access

[9] *See Networked Nation: Broadband in America 2007*, NTIA at p. 5 (Jan. 2008).

[10] *Id*.

[11] *See Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8801, ¶ 47 (1997) (subseq. history omitted); *see also Rural Cellular Ass'n. v. FCC*, 588 F.3d 1095, 1104 (D.C. Cir. 2009).

[12] Broadband Plan p. 142.

[13] *Id*.

charges for VoIP may provide an incentive for IXCs and other companies that are net payers of access to benefit from arbitrage by shifting traffic to VoIP, it would not provide terminating carriers — in particular terminating carriers in rural markets, with any incentive to modernize their voice networks for the seamless exchange of IP traffic. In contrast, by bringing VoIP within the same access structure as TDM traffic, the Commission can provide rural LECs the incentive to invest in upgrading their capability to terminate voice networks in IP format and encourage arrangements for IP interconnection without fear that doing so will sacrifice their ability to obtain the intercarrier compensation to which they are entitled.

It is thus sensible for the Commission to allow rural carriers to maintain the level of revenues necessary to support broadband and IP network upgrades without artificially eliminating investment incentives. If the Commission adopts a framework for long term intercarrier compensation reform similar to that discussed in the NPRM and in the Broadband Plan, these revenues will decrease over time and be replaced in certain circumstances and where appropriate with funds from the Connect America fund. By definitively holding that VoIP is subject to the same compensation regime as TDM traffic, the Commission will stabilize the revenue stream rural carriers receive for the use of their networks and will eliminate an artificial barrier to further investment and fulfill its policy objective of hastening the arrival of broadband and IP networks universal IP interconnection.

Subjecting VoIP traffic to the same intercarrier compensation rules as TDM traffic is also consistent with the goals of the Act, namely encouraging facilities-based competition and deployment of advanced communications infrastructure. Without intercarrier compensation reform and clarification that access charges apply to VoIP traffic, investors will not receive the correct pricing signals regarding the cost of providing VoIP services. For instance, such costs would not include the costs other carriers incur (and ordinarily pass on) to connect their end users to the VoIP providers end users. The Commission has previously found that such inaccurate signals distort competition.

Similarly applying the same level of access charges to VoIP traffic preserves competitive neutrality and avoids arbitrarily picking winners and losers. Since releasing the IP-enabled services NPRM,[14] in 2004 the Commission has extended a number of important rules that apply to telecommunications carries to VoIP providers without classifying VoIP as a telecommunications service.[15] In these decisions the Commission has found that applying these Title II requirements to VoIP providers "promotes the principle of competitive neutrality" by "reduc[ing] the possibility that carriers with [such] obligations will compete directly with providers without such obligations."[16] Consistent with this principle of competitive neutrality,

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[14] *IP-Enabled Services*, 19 FCC Rcd 4863 (2004).

[15] *See IP-Enabled Services*, 24 FCC Rcd 6039 (2009) (extending Section 214 discontinuance requirements to interconnected VoIP providers); *Telephone Number Requirements for IP-Enabled Services Providers*, 22 FCC Rcd 19531 (2007) (requiring VoIP providers to comply with the same local number portability requirements that apply to carriers); *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals With Hearing and Speech Disabilities*, 22 FCC Rcd 11275 (2007) (Commission required VoIP providers to comply with the same disability access requirements applicable to telecommunications carriers); *Implementation of the Telecommunications Act of 1996, Telecommunications Carrier's'' Use of Customer Proprietary Network Information and Other Customer's Information, IP-Enabled Services*, 22 FCC Red 6927 (2007) (Commission required VoIP providers to comply with the obligations imposed on telecommunications carriers to protect CPNI from unauthorized disclosure); *Universal Service Contribution Methodology*, 21 FCC Rcd 7518 (2006) (Commission required VoIP providers to make USF contributions) ("*Interim Contribution Order*"), *vacated in part sub nom. Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007); *IP-Enabled Services & E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245, 10261-63 ¶¶ 26-29 (2005) (Commission required VoIP providers to provide E911 capability to customers as a standard feature).

[16] *Interim Contribution Order*, 21 FCC Rcd at 7541 ¶ 44.

the Commission rejected the notion that applying similar requirements to both VoIP and telecommunications services would frustrate the FCC's "policies of encouraging the development of IP-based services and promoting the deployment of broadband infrastructure."[17] Instead the Commission found that it does "not believe that those policies are best advanced by giving one class of providers an unjustified regulatory advantage over its competitors."[18]

Finally, it is not necessary to classify interconnected VoIP as a telecommunications or information service in order to reach the desired result. Obviously, the Commission has already applied a wide range of regulatory obligations on interconnected VoIP providers without taking the step of classifying VoIP services as either an information or telecommunications service. In fact, the Commission's existing legal framework recognizes that the provision of telecommunications services to VoIP providers does not then immunize those telecommunications services from the obligations Title II imposes on telecommunications carriers.[19]

B. The Commission Should Clarify that Access Charges Apply on All VoIP Traffic that use North American Numbering Plan Telephone Numbers

In the NPRM, the Commission proposes to limit its discussion of intercarrier

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[17] *Universal Service Contribution Methodology, Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, 25 FCC Rcd 15651, 15660 ¶ 22 (2010) ("*Nebraska/Kansas VoIP USF Order*").

[18] *Id*.

[19] *See Petition of Time Warner Cable for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers,* 22 FCC Rcd 3513, 3517 ¶ 8 (2007)*; Bright House Networks, LLC, et al. v. Verizon California, Inc., et al.*, 23 FCC Rcd 10704, 10718-20 ¶¶ 39-41 (2008) *aff'd. Verizon California, Inc. v. F.C.C.,* 555 F.3d 270, 275 (DC Cir. 2009).

compensation on VoIP traffic to interconnected VoIP.[20] This would not be sufficient. While the Commission's definition of interconnected VoIP seems straightforward, there apparently are some in the industry that interpret the last prong of the Commission's definition to require that a service be able to both originate *and* terminate calls. Some VoIP providers, under the belief that offering customers services that allow them to make — but not receive — calls can avoid the obligations the Commission has applied to Interconnected VoIP providers. While CCI does not agree with this dubious interpretation of the 'rules, the Commission should clarify that a compensation (including reciprocal compensation and access) obligation attaches to any call, regardless of the underlying technology used, where the call originates from or terminates to a caller that uses a telephone number issued under the North American Numbering Plan. Under the current framework, this would encompass all calls regardless of the underlying technology used, where the call originates or terminates to a caller served by the PSTN, and would have the ability to cover VoIP to VoIP calls in the future, consistent with whatever plan the Commission adopts for comprehensive intercarrier compensation reform.

Limiting the compensation discussion to interconnected VoIP creates an arbitrary distinction. The functions that a terminating LEC provides do not differ when the IXC or VoIP provider only offers an outbound service. The same principle applies for originating LECs sending calls to customers using a VoIP provider's inbound–only service. In each case, the services provided by the LEC are identical to the services provided when the IXC or VoIP provider offers bi-directional service. Nor do the LEC's costs vary based on the nature of the offering by the called or calling party's provider. To bake such an arbitrary distinction into the Commission's compensation regime would simply lead to further disputes and arbitrage. Carriers

[20] NPRM ¶ 612 n. 923 citing 47 C.F.R. § 9.3.

seeking to avoid the payment of intercarrier compensation would restructure their offerings to provide only uni-directional services in order to claim an exemption from access charges. To avoid further regulatory arbitrage, this purported ambiguity should be resolved by declaring that any voice service that sends calls to or receives calls from the PSTN is subject to the Commission's intercarrier compensation rules.

III. The Commission Should Confirm That All Carriers Have An Immediate Obligation To Pay Existing Intercarrier Compensation Rates on VoIP Traffic.

As explained above, the best option for the Commission to fulfill its statutory goals and the ambitions set forth in the Broadband Plan is to place all providers that carry voice traffic to or from the PSTN on an equal footing. This way, all voice providers will be playing under the same set of rules and rural carriers can focus on deploying broadband networks and transitioning their networks for an all IP world where there are no intercarrier compensation payments, without the concern that such a transition will result in a loss of revenues, and create additional arbitrage opportunities requiring litigation to resolve.

The Commission has ample legal authority to implement this compensation obligation, regardless of the choice it makes on how to implement the longer term intercarrier compensation reforms set forth in the notice.

A. Jurisdictional Framework

The NPRM seeks comment on two alternative proposals to address comprehensive intercarrier compensation reform. The first alternative involves the Commission's jurisdiction pursuant to Section 251(b)(5) of the Act which would permit the Commission to establish the pricing methodology for all telecommunications traffic, even intrastate traffic which has traditionally been the province of the states. The second alternative involves the Commission maintaining the existing divided jurisdiction, where the Commission, pursuant to Section 201(b) of the Act governs interstate and international communications and except under certain circumstances, regulation of intrastate communications is left for the states pursuant to Section 2(b) of the Act.[21] While the Commission has ample authority to require intercarrier compensation for VoIP traffic under either alternative, CCI recommends the Commission use its authority under section 251(b)(5).

1. The Commission Should Assert Jurisdiction under § 251(b)(5)

Section 251(b)(5) provides that all LECs have the "duty to establish reciprocal compensation arrangement for the transport and termination of telecommunications." 47 USC § 251(b)(5). The Commission has previously held that VoIP "uses" telecommunications and therefore falls within the ambit of "telecommunications."[22] ''Similarly, the Commission found that the scope of § 251(b)(5) is "not limited…to particular services."[23]'. Thus there is no longer any valid argument that § 251(b)(5) applies only to local services.

Nor is there an argument that § 251(b)(5) does not apply to traffic being terminated by an interexchange carrier. The Commission has already rejected this argument and held that section 251(b)(5) applies to traffic exchanged between a LEC and *any* other carrier.[24] This holding

[21] *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986).

[22] *Interim Contribution Order*, 21 FCC Rcd at 7538 ¶ 39.

[23] *High-Cost Universal Service Support*, WC Docket No. 05-337, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Lifeline and Link Up*, WC Docket No. 03-109, *Universal Service Contribution Methodology*, WC Docket No. 06-122, *Numbering Resource Optimization*, CC Docket No. 99-200, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, *IP-Enabled Services*, WC Docket No. 04-36, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475, 6479 ¶ 8 (2008) ("*2008 Order and ICC/USF FNPRM*") *aff'd Core v. FCC*, 592 F.3d 139 (D.C. Cir. 2010) *cert denied*, 131 S. Ct. 597, 626 (2010).

[24] *See Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9193–94, ¶ 89 n.177 (2001) ("*ISP*

remains codified in 47 C.F.R. § 51.703(a) which states that each "LEC shall establish reciprocal compensation arrangements for transport and termination of telecommunications traffic with any requesting telecommunications carrier." The use of the term "requesting telecommunications carrier" instead of LEC or another subset of telecommunications carrier demonstrates that § 251(b)(5) covers traffic that LECs exchange with IXCs.[25]

Nor is there any debate that the Commission's VoIP compensation rules, if adopted pursuant to § 251(b)(5), would obligate state commissions to adhere to these rules. Section 251(b)(5) extends the Commission's jurisdiction to intrastate traffic as well and is not limited to interstate traffic or limited by section 2(b). Congress charged the Commission with implementing the Act. Section 201(b) of the Act authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." According to the Supreme Court, this "grant in § 201(b) means what it says: The Commission has rulemaking authority to carry out the 'provisions of this Act.'"[26] Thus, the Commission's rulemaking authority under §§ 251(b)(5) and 252(d)(2) is not confined by Section 2(b) to interstate matters.[27].

Under § 252, the Commission has the authority to develop a methodology for pricing 251(b)(5) traffic and the states will implement the methodology and set the rates. As explained above, that methodology is simple: all VoIP traffic that originates or terminates on the PSTN

Remand Order"); *remanded by WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) ("Section 251(b)(5) applies to telecommunications traffic between a LEC and a telecommunications carrier . . . .").

[25] *See e.g. USTA v. FCC*, 359 F.3d 554, 592 (D.C. Cir. 2004) (rejecting FCC rule attempting to limit the term telecommunications service to local telecommunications service).

[26] *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999).

must pay the same compensation to which TDM traffic is subject. In establishing that methodology, the Commission should provide that carriers can use the NPA-NXX of the originating and terminating callers as a proxy to approximate the location of such callers. In other words, treatment of calls where the originating and terminating numbers make the call appear as a local call will be subject to reciprocal compensation; calls where the numbers make the call appear to be an intrastate interexchange call shall be treated as intrastate and subject to intrastate access charges; and calls that appear as interstate or international long distance calls will be subject to interstate access charges. The rates for such compensation have already been set. Intrastate access charges are set pursuant to state access regimes and typically established in state filed access tariffs; interstate rates pursuant to tariffs filed at the Commission; and local reciprocal compensation rates negotiated in interconnection agreements or set by state commissions pursuant to Section 252 of the Act. And of course these rates will be interim rates until the Commission has completed the reform of intercarrier compensation so that all compensation is set at a level consistent with the pricing standard in Section 252. Until then, the Commission has ample legal authority to establish transitional mechanisms until rates are brought to appropriate levels.[28]

Nor does the Section 251(b)(5) framework require a distinction between nomadic and fixed VoIP for purposes of intercarrier compensation. Rather than asserting jurisdiction over

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[27] *Id*. at 378 n.6 ("[T]he question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has.")

[28] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15866-67 ¶ 726 (1996) (subseq. history omitted) (requiring purchasers of unbundled local switching to pay non-cost-based rates for interim period), *aff'd Competitive Telecommunications Association v. FCC*, 117 F.3d 1068, 1073-74 (8th Cir. 1997) (noting "substantial deference" accorded by courts to agency "when the issue concerns interim relief") *quoting MCI Telecomms. Corp. v. FCC*, 750 F.2d 135, 140 (D.C. Cir. 1984).

traffic based on the jurisdiction of the call, the Commission's jurisdiction over all telecommunications traffic would apply regardless of the jurisdiction of the call. In other words, the critical distinction between nomadic and fixed VoIP traffic — whether the provider or carrier can identify the physical endpoints of the call — is irrelevant. This renders the § 251(b)(5) approach superior to relying on the existing federal/state divided jurisdiction because it eliminates the problem nomadic VoIP traffic poses with respect to jurisdiction.

2. While the Commission Should Assert Jurisdiction Under § 251(b)(5), it Could Assert Jurisdiction Under § 201(b) and Still Require Payment of Intrastate Access Charges

While the Commission can use the existing bifurcated regulatory framework to harmonize its treatment of access charges on VoIP traffic with its treatment of access charges on TDM traffic, it should not be the preferred mechanism because it is not comprehensive enough and unnecessarily complicates the decision-making making process and in the end may not result in a uniform approach in all states. Nonetheless, it is an alternative that is available to the Commission and leaves room for the Commission to require payment of intrastate access charges until such charges are phased out under any comprehensive reform plan.

As an initial matter, the Commission could not conclusively assert jurisdiction over intrastate VoIP traffic without using its broad power delegated under § 251(b)(5). While Section 201(b) provides the Commission with broad regulatory power for establishing an intercarrier compensation regime for VoIP traffic, such a regime would be limited to interstate traffic, because the Commission's jurisdiction over intrastate traffic is "fenced" in by Section 2(b).[29]

Of course, the Commission could declare that all IP based voice traffic is jurisdictionally interstate, consistent with its preemption finding that Vonage's VoIP service was jurisdictionally

[29] *Louisiana PSC*, 476 U.S. at 369.

interstate in the *Vonage Order*.[30] The Commission could thus proceed here as it has in the case of state assessment of USF. Under the *Vonage Order*, only the Commission has the ability to assess a USF contribution requirement on Vonage's VoIP service.[31] 'In the *Universal Contribution Methodology* decision, the Commission set a 64.9% safe harbor for the amount of revenue that was interstate and subject to federal USF.[32] Thus, pursuant to the *Kansas/Nebraska VoIP USF Order*, the remaining 35.1% can be subjected to state USF contribution requirements. In the *Kansas/Nebraska USF Order,* however, the Commission has provided that states can assess USF on the non interstate portion of the VoIP provider's revenue.[33] A similar regime could be established for intercarrier compensation on VoIP traffic.

The Commission could apply similar logic to VoIP traffic and access charges. By dictating the use of the NPA-NXX to serve as the proxy for the originating and terminating physical points of the call, the Commission could require payment of interstate access charges on calls where the originating and terminating NPA-NXX reflect different states, intrastate access where the originating and terminating NPA-NXX reflect the same states but not local, and reciprocal compensation where they reflect a local call.[34]

In order to adopt this framework, however, the Commission would have to go through another preemption analysis. And as it indicated in the *Kansas VoIP USF Order*, such a

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[30] *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission,* 19 FCC Rcd 22404, 22418-19 ¶ 23 (2004) ("*Vonage Order*").

[31] *Vonage Holdings Corp. v. Nebraska Public Service Comm'n*, 564 F.3d 900, 905 (8th Cir. 2009).

[32] *Interim Contribution Order*, 21 FCC Rcd at 7544–45, ¶ 53.

[33] *Nebraska/Kansas VoIP USF Order,* 25 FCC Rcd at 15658 ¶¶ 16-17.

[34] *See Palmerton Telephone Company v. Global NAPs,* C-2009-2093336, at p. 24 (P.A. P.U.C. Feb. 11, 2010) ("*Palmerton*") (recognizing difficulty in using NPA-NXX as proxy for location)

preemption analysis regarding fixed VoIP is problematic when it comes to application of the impossibility doctrine on which the *Vonage Order* relied as the predicate for its preemptive effect.[35] The Commission has stated, in *Universal Contribution Methodology*,[36] the *VoIP 911 Order* and the Nebraska/*Kansas VoIP USF Order* that the impossibility doctrine is no longer a clear obstacle to the Commission's ability to allocate regulatory responsibility between itself and the states with respect to VoIP services.[37] Because Section 251(b)(5) provides a more direct path to the same result, with a stronger legal basis for asserting the Commission's jurisdiction and promotes a comprehensive solution, the Commission should avoid relying solely on its § 201(b) power.

As another, but likely unworkable, alternative, the Commission could impose access charge regulation only on interstate VoIP (again relying on NPA-NXX) and urge — but not require — states to follow the Commission's lead. Many state commissions that have addressed these issues have found that access charges are owed.[38] The decisions that have barred collection of access charges have largely been by courts, not final decisions of state commissions.[39] And in the past, a number of state commissions have expressly looked to the Commission for guidance

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[35] *Vonage Order*, 19 FCC Rcd at 22418-19 ¶ 23.

[36] *Interim Contribution Order*, 21 FCC Rcd at 7544, ¶ 52 and 7546 ¶ 56.

[37] *Nebraska/Kansas VoIP USF Order,* 25 FCC Rcd at 15657 ¶ 15.

[38] *See e.g. In the Matter of the Petition of Southwestern Bell Telephone Company d/b/a AT&T Kansas for Compulsory Arbitration of Unresolved Issues with Global Crossing Local Services, Inc. and Global Crossing Telemanagement, Inc. for an Interconnection Agreement Pursuant to Sections 251 and 252 of the Federal Telecommunications Act of 1996*, Docket No. 10-SWBT-419-ARB, (K.C.C. Aug. 13, 2010); *Petition of UTEX Communications Corporation for Arbitration Pursuant to Section 252(b) of the Federal Telecommunications Act and PURA for Rates, Terms, and Conditions of an Interconnection Agreement With Southwestern Bell Telephone Company*, Docket No. 26381 Arbitration Award,- (Tex. PUC Sep. 23, 2010).

[39] *See e.g. PAETEC v. CommPartners,* Civ. Action No. 08-0397, Memorandum Order (D. D.C. Feb. 18, 2010); *Sw. Bell Tel., L.P. v. Mo. Pub. Serv. Comm.*, 461 F. Supp. 2d 1055, 1074 (E.D. Mo. 2006).

on this issue.[40] Of course there is also the possibility that some states would elect not to follow the Commission's course on access charges resulting in a whole new avenue for arbitrage. Nonetheless, this voluntary bifurcated approach provides neither the comprehensive solution nor the stability necessary for reform of intercarrier compensation, again leaving section 251(b)(5) as the best alternative.

B. Application Of Intercarrier Compensation To VoIP Traffic Is Consistent With The Existing Regulatory Regime

Nothing in the current regulatory regime stands as an obstacle to the Commission's decision to apply to VoIP traffic the same intercarrier compensation rules that currently apply to TDM traffic. While some in the VoIP business who prefer to obtain a free ride on other carrier's networks claim that the ESP exemption extricates them from the payment of access charges, these claims are baseless. It is clear that the ESP exemption does not impede the Commission's ability to enact a comprehensive intercarrier compensation regime that treats VoIP traffic like all other voice traffic.

Indeed, these arguments, and the cases purporting to exempt IXCs from an obligation to pay access charges have relied on an imprecise and overly-expansive concept of the ESP exemption. Considering the merits of this argument fully requires a review of how the ESP exemption came into being.

1. The ESP Exemption Does Not Prevent the Commission From Mandating Access Charges be Paid on VoIP Traffic

When the Commission first established the system of access charges to replace the settlements between the Bell System long distance and local telephone entities, the Commission

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[40] *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement, Order Addressing Threshold Issues and Motion to Dismiss*, 2004 WL 970861 (Tex. PUC, April 16, 2004) (holding arbitration decision in abeyance until FCC addressed VoIP compensation issues).

sought to require all companies that used the local telephone company's network to pay access charges. As the Commission explained shortly after adopting the access charge regime, its "intent was to apply these carrier's carrier charges to interexchange carriers, and to all resellers and *enhanced service providers*."[41] The Commission's subsequent reversal and decision to exempt enhanced service providers from the access regime was not based on any technological distinction between enhanced services and basic telecommunications services but rather on the view that it wanted an orderly transition to the new system and would seek to avoid rate shock.[42] The Commission did not intend its "exemptions to be permanent."[43] '

Subsequent to the 1996 Act, the Commission re-authorized this exemption and found that "ISPs may purchase services from incumbent LECs under the same intrastate tariffs available to end users."[44] Under this regime, ISPs may pay "business line rates and the appropriate subscriber line charge."[45] Of course, ISPs were not using the PSTN for voice calls. The Commission "explained that ISPs should not be subjected to an interstate regulatory system designed for circuit-switched interexchange voice telephony solely because ISPs use incumbent LEC networks to receive calls from their customers."[46] Instead, the continuation of the ESP exemption in 1997 reflected the Commission's view that "it is not clear that ISPs use the public switched network in a manner analogous to IXCs."[47] Nor did the Commission expect ISPs not to

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[41] *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 F.C.C. 2d 682, ¶ 76 (1983).

[42] *Id*. ¶ 83.

[43] *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers,* 3 FCC Rcd 2631 ¶ 3 (1988).

[44] *Access Reform*, 12 FCC Rcd 15982, 16132 ¶ 342 (1997).

[45] *Id*.

[46] *Id*. at 16133 ¶ 343.

[47] *Id*. at 16133 ¶ 345.

pay ILECs for use of their networks. Rather, the ESP exemption was further predicated on the understanding that ESPs would "pay for their connections to incumbent LECs networks by purchasing services under state tariffs."[48]

Those parties that have sought to shield themselves from access charge liability are guilty of an overbroad reading of the Commission's so called ESP exemption. A correct reading of the Commission's decisions that make up the "ESP exemption" shows that the exemption merely provides that an ESP is treated as an end user for purposes of the Commission's access charge rules, so that such an entity has the *option* of purchasing business local exchange services instead of access services from a local exchange carrier. The issue today with respect to VoIP disputes is that the connection to the terminating LECs billing for access charges are not made by the ESPs themselves but by carriers. The typical practice, however, because VoIP providers lack the ability or the network breadth to connect universally with every LEC, is that VoIP providers rely on carriers to transport and terminate traffic to other carriers for delivery to called parties on the PSTN (or vice versa for call originated on the PSTN).

In other words, the VoIP provider is the beneficiary of the ESP exemption, having the right to purchase end user business lines from carriers; but when those carriers pass traffic to other carriers for delivery to or from the PSTN, they are obligated to pay the applicable access charges. In other words, the "exemption" applies only to ESP "providers" and does not exempt traffic from any applicable compensation regime. Indeed, the Commission clearly articulated that there is no "exemption" that gets passed along to telecommunications carriers who happen to provide services to an enhanced service provider.[49] ""Thus, to the extent a VoIP provider is an

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[48] *Id*. at 16134 ¶ 345.

[49] *Northwestern Bell Tel. Co. Petition for Declaratory Ruling*, 2 FCC Rcd 5986, 5988 (1987), at ¶ 21, *vacated as moot*, 7 FCC Rcd 5644 (1992). ("End users that purchase interstate

ESP, it can obtain local business lines from a carrier to originate VoIP calls. But that provider is not entitled to carry that exemption with it and avoid access charges when it carries (or hires others to carry) those calls and delivers those calls to other LECs for delivery to their end users.[50]

The ESP exemption does not, however, *require* ISPs to purchase local business lines to terminate or originate calls. It is an option. In fact for VoIP providers, it would be virtually impossible and inefficient for it to purchase local business lines from every incumbent LEC where its customers might want to make VoIP calls. For such situations, the Commission's rules, and the order adopting the ESP exemption, allow ISPs another choice - they can use the mechanisms in place for originating and terminating interexchange carrier traffic— switched access services provided under access tariffs and delivered over Feature Group D trunks. The ESP exemption does not give ISPs the ability to forego the purchase of local business lines then deliver traffic over services and facilities specifically designed to receive interexchange carrier traffic and then claim such traffic - is somehow exempt from the charges applicable to all other traffic that traverses such systems.

IV. The NPRM's Proposals Regarding the Intercarrier Compensation Treatment of VoIP Traffic that do not Immediately Apply the Same Compensation Regime Applicable to PSTN Calls are Seriously Flawed and Should not be Adopted

The NPRM seeks comment on other proposals regarding the appropriate regime for intercarrier compensation on VoIP traffic. These alternatives include the immediate adoption of bill and keep;[51] an immediate imposition of an obligation to pay a VoIP specific rate;[52] and

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services from interexchange carriers do not thereby create an access charge exemption for those carriers.")

[50] The same principle would apply with respect to VoIP providers using local business lines to receive calls that were originated in TDM by LECs.

[51] NPRM ¶ 615.

imposition of a compensation obligation on VoIP traffic at some point in the future.[53] Each of these proposals suffers serious flaws that render them incompatible with the Commission's goals for comprehensive intercarrier compensation reform.

To begin, those proposals that would immediately exempt VoIP traffic from any intercarrier compensation by mandating bill and keep for VoIP traffic would impede the Commission's goal of fostering investment in broadband, particularly broadband to serve rural communities. Companies such as CCI that serve these rural communities rely on intercarrier compensation revenue for funding existing services as well as for providing capital to invest in expanding broadband. The Broadband Plan recognized the connection between intercarrier compensation revenue and broadband investment. The proposal to exempt VoIP traffic immediately from any compensation obligation eviscerates that goal. Similarly, any proposal that would immediately set the rate for intercarrier compensation at or close to zero, such as $.0007, suffers the same serious deficiency and should likewise be rejected.

Just as problematic are the proposals that would treat VoIP traffic that terminates or originates on the PSTN differently from PSTN to PSTN traffic, including the proposal to delay application of a compensation obligation to some future date. Such treatment would be arbitrary for several reasons and would undermine the goals underlying comprehensive intercarrier compensation reform.

Obviously, selecting VoIP to enjoy a lower intercarrier compensation rate (even for a temporary transitional period) is not technology neutral and picks winners and losers. But more significantly, and in direct conflict with the goals set for reform, establishing a separate rate for VoIP traffic will only encourage further arbitrage and lead to additional disputes, as carriers will

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[52] *Id.* ¶ 616.

go to great lengths to label traffic as VoIP in order to avoid compensation or to take advantage of a lower VoIP intercarrier compensation rate.

Such arbitrage schemes will be aided by the same issue that plagues current disputes: the inability to distinguish VoIP traffic clearly from non-VoIP traffic. While numerous carriers have refused, for example, to pay Consolidated's bills for switched access voice services on the grounds that some of the traffic was VoIP-originated traffic, none of these companies have been able to identify with precision the specific calls that are VoIP. This occurs for a number of reasons.

Firstly, the VoIP traffic that connects to the PSTN uses telephone numbers associated with the PSTN. These numbers, however, are provided to carriers, not VoIP providers. The VoIP providers then get the numbers from the carriers. Thus the NANP record associated with a particular telephone number in most instances reflects the name of the LEC providing wholesale service to the VoIP provider. Where that LEC also provides PSTN voice services, it is impossible for other LECs (such as CCI) that terminate the calls to verify the claim that a particular call was VoIP originated using the telephone number of the VoIP customer. This problem is exacerbated when telephone numbers are ported to and from VoIP providers and their underlying carriers; such numbers are not traceable to particular service.

A number of the state commission decisions that have upheld the right of LECs to collect switched access on VoIP traffic have wrestled with this fundamental problem. For example, in New Hampshire, where the PUC ruled that access charges apply to VoIP traffic, the PUC observed that "there is nothing in those call detail records to distinguish 'regular' voice traffic

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[53] *Id*. ¶ 617.

from ESP or any other IP-enabled traffic."[54] Like other carriers serving VoIP providers, the CLEC involved in the New Hampshire case, Global NAPs "admit[ted] that it does not know the original format of the calls it receives from its ESP customers for transport." *Hollis Tel.* at p. 22. Global Naps further admitted that it did not separately identify "the format of the traffic it receives."[55] Similarly in *Palmerton*, the Pennsylvania Commission found that the terminating LEC "cannot technologically determine whether such calls originated in IP format in the first place."[56] "'" A policy that requires carriers to distinguish VoIP traffic from other traffic would invite further disputes and continued litigation, depriving carriers of revenue necessary for deploying broadband services.

V. Requiring Intercarrier Compensation For VoIP Traffic Is Consistent With Underlying Policies Regarding Common Carriage

While the Commission has studiously sought to avoid imposing a common carriage obligation on VoIP providers, there is no doubt that there is a common carriage obligation on the carriers that currently provide service to VoIP providers. And there is obviously a common carriage obligation on the LECs such as CCI that serve customers who receive VoIP originated calls or originate calls that are made to other end users that receive their telephone service using VoIP. There is a quid pro quo underlying the common carriage framework; the carrier must serve all shippers indifferently by accepting all requests for service and by charging all shippers on a

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[54] *Hollis Telephone, Inc. et al.*, DT 08-028, at p. 21 (N.H. Pub. Utils. Comm'n Nov. 10, 2009) ("*Hollis Tel*").

[55] *Id.* at p. 22.

[56] *Palmerton*, at p. 25 (recognizing that "the Verizon PA tandem switch does not identify whether particular GNAPs calls that eventually terminate at Palmerton's network have originally been IP-enabled.")

nondiscriminatory basis.[57] “”In return, the shippers must pay the carrier’s fee. This framework falls apart if the shippers can force carriers to accept some shipments for free or at a discount.

Consider how this framework applies to the termination of VoIP-originated traffic. There is no disagreement that the provision of telecommunications service as defined in the Act requires provision of service on a common carriage basis.[58] The Commission has squarely found that carriers serving VoIP providers provide telecommunication service.[59] Similarly, the carriers — here terminating LECs — that receive VoIP originated calls are also telecommunications carriers and thus common carriers. As a result of this common carrier status, terminating LECs have the obligation to provide service indifferently to all who seek their service.[60] This includes other carriers. In other words, a terminating LEC cannot refuse to accept traffic from an IXC that seeks to use the terminating LEC’s facilities to complete calls to the LEC’s end users. Consistent with this understanding of common carriage, the Commission has held that “no carriers…may block, choke, reduce, or restrict traffic in any way.”[61] Similarly, the Commission has determined that “call blocking is an unjust and unreasonable practice” prohibited under § 201(b).[62]

The common carrier regime that requires LECs to complete the calls sent to it by IXCs also establishes a regime for compensating terminating LECs for the use of their facilities in

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[57] *See NARUC v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (the “sine qua non of common carrier status is a quasi public character which arises out of the undertaking to carry for all people indifferently.”)

[58] *National Cable & Telecomms. Ass’n. v. Brand X Internet Svcs*., 545 U.S. 967, 977 (2005).

[59] *Time Warner Cable*, 22 FCC Rcd at 3517 ¶ 8.

[60] *See NARUC*, 533 F.2d at 608.

[61] *Establishing Just and Reasonable Rates for Local Exchange Carriers*, 22 FCC Rcd 11629, 11632 ¶ 7 (2007).

[62] *Id*. at 11631 ¶ 5.

completing such calls to their end users.[63] Certain carriers that serve VoIP providers now seek to undermine this framework by insisting that certain traffic —VoIP-originated traffic—as opposed to all other traffic — should be delivered free of charge, regardless of the costs the terminating LEC incurs in delivering such traffic. The conundrum is that terminating LECs are not free to reject the request to complete these VoIP calls. In other words, the VoIP carriers want to have the benefit of the common carriage requirement that all LECs complete VoIP calls to their end users, but refuse to honor the flip side of the common carrier bargain —that the terminating carrier receives compensation for delivering that traffic.

If the Commission blesses the VoIP loophole, it threatens to rip apart the fabric of interconnected networks that allows any customer of any carrier in the country to call any other customer and know that the call will go through. This cannot be a desired byproduct of the transition to IP networks.

VI. The Commission Should Also Prohibit VoIP Providers From Blocking Calls Under The Same Rules It Applies To Carriers

As described above, telecommunications carriers are prohibited from blocking calls. While the Commission has gradually expanded the regulatory obligations of interconnected VoIP providers to include a number of duties the Act imposes upon telecommunications carriers,[64] the Commission has not prohibited VoIP providers from blocking calls. CCI is aware that some VoIP providers have taken it upon themselves to block calls to certain exchanges under certain circumstances, for example, in order to avoid terminating traffic to LECs allegedly involved "traffic stimulation." Of course, the carriers that compete with these VoIP providers, but provide regulated telecommunications service, are precluded from taking similar measures.

[63] *See e.g.* 47 C.F.R. § 69.5.

[64] *See* n. 15 *supra*.

This results in a competitive imbalance as carriers inevitably bear a higher cost to complete the same calls compared to a provider of VoIP service. The Commission should remedy this issue by applying the same no blocking restriction to VoIP providers.

VII. Phantom Traffic

CCI supports the Commission efforts to (1) identify call detail information necessary for carriers to bill intercarrier compensation and (2) impose call signaling requirements on all service providers that send intrastate and interstate traffic to, and/or handle traffic destined for, the PSTN. The proposed rule set forth in the NPRM, is an important first step and the Commission has sufficient legal authority to apply this rule to both interstate and intrastate calls as well as to extend the requirement to VoIP providers under its ancillary jurisdiction. In order to achieve the Commission's goal of eliminating phantom traffic and the resulting arbitrage, however this proposed rule does not far enough and should be modified to ensure that all service providers provide and pass, without alteration, not only all signaling but also information regarding the previous provider in the call flow so that terminating carriers can accurately identify the responsible IXC for billing applicable intercarrier compensation.

A. Background on Carrier Billing

In order to understand the real scope of phantom traffic, and the problem it poses for terminating carriers, it is necessary to first review how carriers exchange traffic today, the call detail and records that are (or are not) sent with the traffic, and the various mechanisms carriers have available to bill for traffic.

To render accurate bills to other carriers, a terminating carrier must rely upon the originating and all intermediate or transit carriers to transmit accurate call detail via the SS7 signaling network and switch records. Today, terminating LECs typically rely on some combination of terminating switch recordings (which can capture available SS7 data) and records provided by the intermediate or transit carrier (i.e. Exchange Message Interface ("EMI")) to bill terminating compensation. Thus, in any carrier's billing system, there are several sources of potential error: (1) errors in the carrier's own switch recording/billing system; (2) errors in the SS7 data and switch records available to the terminating switch; (3) errors in the call detail and/or call records provided by the intermediate carrier and (4) errors in the call detail and/or call records provided by the originating caller's provider.

Many carriers already exchange SS7 records with every call. Under the current framework, for § 251(g) traffic, the originating carrier (typically another LEC) sends an SS7 message with each call it routes, including the Carrier Identification Code ("CIC") of the interexchange carrier ("IXC"), and the shared/interconnected SS7 network of all interconnected carriers should pass that same information on to all carriers involved in the call flow until the call reaches the called party. The same is true for § 251(b)(5) traffic exchanged between two carriers that are directly interconnected using SS7 signaling.

SS7 fields vary by call type, vendor, and switch. As such, a carrier's switch may record information that does not match the EMI record standard and must be manipulated in order to conform to that standard. This sometimes makes it difficult to reconcile switch recordings with EMI records, especially when there is a discrepancy between the number of calls the terminating carrier's switch records and the number of EMI records sent by the interconnecting or transit carrier. In these cases the terminating carrier has received the information, but in order to use such information, the terminating carrier must manipulate it.

B. The Commission's Proposed Rule Should be Adopted But Additional Measures are Necessary to Reduce Phantom Traffic

CCI supports the proposed rule set forth in the NPRM that requires all providers handling interstate and intrastate calls bound for the PSTN to include appropriate CPN or CN information in the signaling stream in order to facilitate billing of tariffed access charges. The Commission has sufficient legal authority to apply its signaling rule to both interstate and intrastate calls. Recognizing the growth of VoIP services, CCI further agrees with the Commission's proposed rule change that would apply its signaling rule to VoIP providers, and agrees that the Commission has the legal authority to do so.[65] As explained below, however, this rule does not go far enough to eliminate to problems LECs experience with access charge billing for phantom traffic. For example, the proposed rule will not always provide a terminating LEC the information necessary to identify the IXC that owes access charges. For that reason, in addition to supporting the proposed rule, CCI urges the Commission to consider modifications to that rule to accomplish its goals.

1. The Commission Should Adopt its Proposed Call Signaling Requirements on All Providers that Send Traffic to and/or Handle Traffic Destined for PSTN.

In the NPRM, the Commission recognizes that the current intercarrier compensation regime gives some service providers an incentive to conceal the source of calls in order to reduce or even avoid liability for intercarrier compensation. NPRM ¶ 620. The NPRM then proposes to amend its existing signaling rules to assist terminating carriers in identifying traffic and the party responsible for payment of any intercarrier compensation that is owed. *Id*. In general, CCI welcomes these rule changes as an important first step in reducing and eventually eliminating the phantom traffic that crosses CCI's network. CCI thus supports the proposed amendments to rule 64.1601 set forth in Exhibit B of the NPRM. As explained below, the Commission has ample legal authority to apply this modified rule to both interstate and intrastate traffic and can exercise its ancillary jurisdiction to apply the rule to VoIP providers.

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[65] As CCI explains in section II.B above the Commission should not apply this rule to all VoIP providers that use NANP telephone numbers not just interconnected VoIP providers.

a. The Commission Has Jurisdiction to Impose the Proposed Signaling Requirements on Both Interstate and Intrastate Calls

There should be little dispute that the Commission has jurisdiction to extend its signaling requirements to intrastate calls, as well as to interstate calls. First, the Commission has jurisdiction over intrastate calls under § 251(b)(5) and to the extent the Commission brings all intercarrier compensation under the section 251(b)(5) regime, the Commission's authority to establish signaling rules for intrastate calls should not be in dispute.[66] To the extent the Commission maintains the existing regime for access charges under § 251(g), the Commission's authority may appear to be limited by Section 2(b) of the Act, which limits the Commission's authority over intrastate matters.[67] If the Commission's authority to apply its proposed signaling rule to intrastate calls were confronted with a claim under section 2(b), the Commission would have substantial grounds to preempt inconsistent state regulation. Because the call signaling networks used in routing telecommunications services and the billing systems used by carriers to translate signaling information into billing records are indisputably jurisdictionally mixed services facilities, under the Supreme Court's decision in *Louisiana PSC*,[68] the Commission can preempt state inconsistent state regulation.

Preemption of inconsistent state regulation of signaling requirements would be appropriate because the "matter to be regulated has both interstate and intrastate aspects" and preemption "is necessary to protect a valid federal regulatory objective" that would be negated

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[66] *See AT&T v. Iowa Utils. Bd.*, *supra* note 27.

[67] *See Louisiana PSC*, 476 U.S. at 370.

[68] *Id*.

absent preemption.[69] As the D.C. Circuit has explained, the FCC may preempt inconsistent state regulation of jurisdictionally mixed facilities and services where that "technological inseparability … prevents the FCC from separating its regulation into interstate and intrastate components."[70]

The FCC has already determined that the signaling systems involved in transmitting CPN are "jurisdictionally mixed."[71] CCI believes that the record will show that the same signaling systems used in passing the CPN when originating interstate long distance calls are indisputably the same systems used when originating intrastate long distance calls. That is certainly the case within CCI's telephone network. There should be no grounds for now deciding that SS7 signaling or the system for exchanging switch records is not jurisdictionally mixed.

The Commission's proposed regulation — requiring all providers to include the CPN when originating calls and to pass that CPN to the next provider in the call flow — can not be separated into interstate and intrastate components. Carrier's signaling systems and technology do not allow the carrier to apply one set of signaling requirements for interstate calls and another set of signaling requirements on intrastate calls. And even if such technology were available it would be impractical for carriers to develop and program separate call signaling functions for interstate and intrastate calls into their networks. Requiring providers to apply different signaling rules based on the type of call is tantamount to requiring providers to operate two separate networks one for interstate traffic and another for intrastate traffic. But under the dual system of jurisdiction established under the Act, "[s]ervice "providers are not required to develop a

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[69] *See Public Service Commission of Maryland v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990).

[70] *Public Utility Commission of Texas v. FCC*, 886 F.2d 1325, 1334 (D.C. Cir. 1989).

[71] *Rules and Policies Regarding Calling Number Identification Service - Caller ID*, 10 FCC Rcd 11700, 11722 ¶ 60 (1995).

mechanism for distinguishing between interstate and intrastate communications merely to provide state commissions with an intrastate communication they can then regulate."[72]

This principle has been enforced in a long line of preemption cases dating back to the mid-1970's. The Commission's ability to preempt inconsistent state regulation over carrier signaling requirements evokes the Commission's assertion of exclusive jurisdiction regarding the ability of consumers to connect their own CPE to the telecommunications network that was upheld in *North Carolina Utils. Comm'n v. FCC*,[73] and cited with approval in *Louisiana PSC*.[74] In *NCUC*, the Fourth Circuit found that state regulations that directly conflicted with the FCC's requirement that users be able to connect their own equipment to the network must yield to the federal regulation, recognizing that to do otherwise would require consumers "to buy two sets of terminal equipment."[75]

The same result would occur here; absent uniformity, state regulators could impose obligations on providers that would be tantamount to a requirement that they operate two sets of signaling systems, one to satisfy federal requirements and one to satisfy state requirements. Similarly the D.C. Circuit has held that Congress did not intent to require "construction of wholly independent intrastate and interstate networks and facilities."[76] The Commission has also held that requiring customers

> to maintain two redundant facilities or to invest in expensive additional equipment simply because of jurisdictional conflicts would violate our congressional mandate in Section 1 of the Communications Act to regulate 'interstate and foreign commerce

[72] *Minnesota P.U.C. v. FCC*, 483 F.3d 570, 579, (8th Cir. 2007).

[73] 552 F.2d 1036 (4th Cir.) *cert denied* 434 U.S. 874 (1977)

[74] 476 U.S. at 370 n.4.

[75] *NCUC*, 552 F.2d at 1049.

[76] *Ill. Bell Tel. Co. v. FCC*, 883 F.2d 104, 116 (D.C. Cir. 1989).

> in communication by wire or radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communications service with adequate facilities at reasonable changes.[77]

The Commission reached a similar finding when it adopted the current rule 64.1601 in 1995.[78]

Similarly, preemption of state regulation that is inconsistent with the Commission's call signaling requirements may be preempted as they would "stand[] as an obstacle to the accomplishment and execution of" important federal objectives. Those objectives are consistent with the federal objective that carriers be able to recover the costs for the use of their networks by other service providers, a long standing federal objective underlying the access charge regime.[79]

The Commission has a strong interest in ensuring accurate identification of interstate traffic as well as an interest in ensuring that intrastate traffic is not mis-identified as interstate traffic and vice versa. This interest is further intertwined with the Commission's strong policy interest in eliminating arbitrage and access billing disputes. As the Commission suggested in the National Broadband Plan, the loss of access revenue can have a harmful impact on the expansion of broadband deployment in rural markets.[80] Similarly protracted billing disputes and investigations unnecessarily tie up resources that could otherwise be invested in bringing broadband and innovative new services to rural customers. Thus, there is a strong federal interest in promoting the exchange of accurate call detail information between providers involved in the

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[77] *American Telephone & Telegraph Co. and the Associated Bell System COS. Interconnection With Specialized Carriers in Furnishing Interstate Foreign Exchange (FX) Service and Common Control Switching Arrangements (CCSA)*, 56 F.C.C. 2d 14, 19 ¶ 17 (1975) *aff'd California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977).

[78] *See Caller ID Order*, 11 FCC Rcd at 11729 ¶ 84-85.

[79] *Access Charge Reform Order*, 12 FCC Rcd at 15991 ¶ 21 and 16137 ¶ 356.

[80] Broadband Plan at p. 142.

call flow in order to reduce arbitrage and inter-carrier disputes.

b. The Commission has ancillary authority to impose its signaling requirement on non-common carriers that carry traffic to and from the PSTN

Considering the proliferation of VoIP services and their growing role in the communications marketplace, it is necessary that the Commission extends its signaling rules to VoIP providers as it has proposed to do in the NPRM. In previous decisions where the Commission has extended Title II regulation to VoIP providers, the Commission established a sound basis for extending its signaling requirement to VoIP providers. In these decisions, the Commission has already extended a series of Title II obligations to VoIP providers pursuant to its ancillary jurisdiction.[81] As a result, there should be little dispute here that the regulatory

[81] *See IP-Enabled Services*, 24 FCC Rcd 6039, 6044-46 ¶¶ 9-12 (2009) (Commission exercised ancillary jurisdiction to extend Section 214 discontinuance requirements to interconnected VoIP providers); *Telephone Number Requirements for IP-Enabled Services Providers*, 22 FCC Rcd 19531, 19544-19547 ¶¶ 24-28 (2007) (Commission exercised ancillary jurisdiction to require interconnected VoIP providers to comply with the same local number portability requirements that apply to carriers); *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals With Hearing and Speech Disabilities*, 22 FCC Rcd 11275, 11286-11289 ¶¶ 21-24 (2007) (Commission exercised ancillary jurisdiction to require interconnected VoIP providers to comply with the same disability access requirements applicable to telecommunications carriers); *Implementation of the Telecommunications Act of 1996, Telecommunications Carrier's'' Use of Customer Proprietary Network Information and Other Customer's Information, IP-Enabled Services*, 22 FCC Red 6927, 6955-57 ¶¶ 55-59 (2007) (Commission exercised ancillary jurisdiction to require "interconnected VoIP" providers comply with the obligations imposed on telecommunications carriers to protect customers' CPNI from unauthorized disclosure); *Universal Service Contribution Methodology*, 21 FCC Rcd 7518, 7528 ¶ 19 (2006) (Commission exercised ancillary jurisdiction to require "interconnected VoIP" providers to make contributions to the FCC's Universal Service Fund on an interim basis), *vacated in part sub nom. Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007); *IP-Enabled Services & E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245, 10261-63 ¶¶ 26-29 (2005) (Commission exercised ancillary jurisdiction to require "interconnected VoIP" providers to supply enhanced 911 capability to customers as a standard feature).

obligation imposed with respect to signaling is related to the Commission's effective implementation of its substantive duties under Title II and is therefore a valid exercise of the Commission's 'ancillary" jurisdiction.

The standard governing the Commission's exercise of its ancillary jurisdiction is clear. The Commission may exercise its ancillary jurisdiction when the Act gives the Commission subject matter authority over the service or function to be regulated[82] and the exercise of regulatory power is "reasonably ancillary to the effective performance of the Commission's various responsibilities."[83] The D.C. Circuit, in *Comcast v. FCC*,[84] has further explained that in order to properly exercise its ancillary jurisdiction, the Commission must adequately "link[] its action to a statutory delegation of regulatory authority"[85] that is "reasonably ancillary" to "express delegated authority" set forth in "Title II, III, or VI" of the Act.[86]

The Commission's exercise of jurisdiction to require providers that originate IP traffic bound for the PSTN to provide the information necessary for intermediate and terminating carriers to facilitate the proper billing of intercarrier compensation easily satisfies the test for ancillary jurisdiction. The Commission has repeatedly held that VoIP services are communication by wire or radio and therefore satisfy the first requirement for the exercise of ancillary jurisdiction.[87] To date, no party has challenged the Commission's conclusion that VoIP services fall within the Commission's general grant of statutory authority.

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[82] *American Library Ass'n v. FCC*, 406 F.3d 689, 691-692 (D.C. Cir. 2005); *United States v. Southwestern Cable Co*., 392 U.S. 157, 177-178 (1968).

[83] *American Library Ass'n,* 406 F.3d at 691-692; *Southwestern Cable*, 392 U.S. at 178.

[84] 600 F.3d 642 (D.C. Cir. 2010).

[85] *Id*. at 659

[86] *Id*. at 654.

[87] *See* note 81 *supra*.

Nor should there be a serious challenge to a conclusion that the Commission's proposed rule (and the modifications suggested within these comments) is reasonably ancillary to the specific regulatory duties Congress granted to the Commission with respect to telephone and telecommunications services under Title II of the Act.[88] The Commission has already found that VoIP service "is increasingly used to replace analog voice service" and that it expects this "trend … will continue."[89] Requiring carriers to include information in SS7 signaling and provide other carriers with switch records in order to enable carriers to collect and bill the rates the FCC has authorized carriers to charge for their services is reasonably ancillary to the Commission's statutory ratemaking power.[90] The Commission also indisputably holds substantial ratemaking power with respect to services offered under Title II.[91] This is especially so because VoIP services are a substitute for and compete with traditional telephone services offered by common carriers. Absent a requirement to facilitate billing of intercarrier compensation, originators of VoIP traffic that are not carriers would be able to circumvent any intercarrier compensation obligations that apply to traffic they originate.

2. The Commission Should Strengthen its Proposed Signaling Rules to Provide Terminating Carriers with the Information Needed to Identify the Party Responsible for Paying Access Charges

In addition to the call signaling requirements, FCC should consider prohibiting providers

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[88] *See Comcast*, 600 F.3d at 657 citing *National Ass'n of Regulatory Utility Commissioners v. FCC*, 880 F.2d 422 (D.C. Cir. 1989).

[89] *IP-Enabled Services*, 24 FCC Rcd at 6046 ¶ 12 (holding that from " the perspective of a customer making an ordinary telephone call, we believe that interconnected VoIP service is functionally indistinguishable from traditional telephone service.").

[90] There are other provisions of Title II that provide a sufficient nexus for the exercise of ancillary jurisdiction here. See 47 U.S.C. § 251(e) (providing the Commission with plenary authority over numbering); 47 U.S.C. § 251(a) (requiring direct or indirect interconnection of telecommunications carriers); 47 U.S.C. § 256 (coordinating interconnectivity).

from changing "call type" fields and requiring each carrier that handles a call to populate the CIC or OCN field with their code so that terminating LECs can identify the responsible IXC. Although the text of the NPRM recognizes in a number of places that all call signaling data should be passed,[92] the text of the proposed rule appears to be limited to CPN, CN, and ANI, but should also address the inclusion of CIC and/or OCN codes to identify the responsible party for payment of intercarrier compensation.[93]

In many places, the NPRM erroneously presumes that identifying "the originating provider" in the call stream alone will facilitate billing and collection of the proper terminating charges. But for standard long distance traffic it is typically not the originating provider (i.e., the LEC serving the originating end user) that is responsible for paying any terminating switched access charges that are due on a long distance call. Rather, it is the IXC (and, where there are multiple IXCs in the chain, the one closest to the terminating end) that is responsible for the terminating charges.

With the advent of least cost routing, a typical long distance call is likely to be passed through multiple service providers from the point of origination to termination. When long distance calls are passed through multiple providers in this way, any carrier that does not originate or terminate a particular call is an "intermediate provider." Only the intermediate provider knows if the call going out of its network has the same call detail that it had when it entered the intermediate provider's switch. Only the intermediate provider knows the breakdown—between intermediate traffic originating from third parties and calls originating

[91] *See e.g.* 47 U.S.C. § 201(b) (requiring rates be just and reasonable); 202 (prohibiting rates that are unreasonably discriminatory); 203 (requiring carriers to set forth rate in tariffs).

[92] NPRM, at ¶¶ 626, 632.

[93] Proposed Amendment to Rule 64.1601(a)(2) requires passage of "all signaling information identifying the *telephone number of the calling party*" (emphasis added).

from the intermediate provider's end users—of the total MOU sent to the terminating carrier. Making the intermediate provider responsible for providing upstream carrier information where call detail is missing and including their CIC code in the signaling stream is imperative given the gatekeeper function served by intermediate providers.

The missing element that must be retained in the call record throughout all handoffs of the toll call is the Carrier Identification Code ("CIC"). The critical field that is required on an InterLATA call is the CIC code associated with the IXC delivering the call to the terminating provider. Thus where an intermediate provider drops the CIC code of the previous carrier and fails to insert its own CIC code or changes the type of call, even with CPN that indicates the call started as toll, it is very difficult for the terminating provider to identify the appropriate party to bill.

To ensure cooperation between terminating carriers, intermediate providers, and originating providers, the Commission should adopt a rule that requires every service provider in the chain of a call to share information necessary to identify the service provider from which the transiting service provider received the call. This information — the CIC or OCN — is critical. Thus each IXC in the chain of a call should be required to populate the CIC code field in the signaling stream with its own CIC code before passing the call to the next carrier. Ultimately the last IXC in the chain must also populate the CIC code field with its code in order to enable billing for intercarrier compensation. The Commission should also require the originating provider to identify the transit provider to whom the originating provider delivered the call. Adopting these affirmative obligations would resolve the issue of service providers denying liability for terminating compensation, yet refusing to cooperate in an investigation to determine the service provider responsible for terminating charges.

VIII. Conclusion

The Commission should adopt the recommended by CCI in order to provide the industry and courts clear guidance regarding intercarrier compensation disputes and to fulfill the Commission's goals of expanding deployment of broadband in rural markets.

Respectfully Submitted,

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